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In the Supreme Court of the United States

OCTOBER TERM, 1956

ESTATE OF EDWARD F. PIPE, DECEASED, NETTIE M. PIPE, EXECUTRIX, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1031

ESTATE OF EDWARD F. PIPE, DECEASED; NETTIE M. PIPE, EXECUTRIX, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 31-40) is reported at 23 T.C. 99. The opinion of the Court of Appeals (Pet. 12-22) is reported at 241 F. 2d 210.

JURISDICTION

The judgment of the Court of Appeals affirming the Tax Court's decision was entered on February 7, 1957. (Pet. 12-22.) A petition for rehearing was

denied on March 4, 1957. The petition for a writ of certiorari was filed on May 27, 1957. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254.

QUESTION PRESENTED

The decedent bequeathed his residuary estate to his wife, giving her the right to the income for life and certain power with respect to the principal, any unconsumed portion of the principal to pass upon her death to named remaindermen. The question is whether the courts below erred in holding that the interest received by the wife did not satisfy the conditions of Section 812(e) of the Internal Revenue Code of 1939, and hence did not qualify for the marital deduction.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 812(e) of the Internal Revenue Code of 1939, and Treasury Regulations 105, Section 81.47a are set forth in the Appendix, *infra*, pp. 11-15.

STATEMENT

All of the facts were stipulated (R. 23-31), and may be summarized as follows:

Edward F. Pipe, the decedent, was a resident of New York who died on September 20, 1948. His last will and testament was admitted to probate on November 10, 1948. (R. 23, 32.) It provided, in part, as follows (R. 27-28):

> SECOND: I give, devise and bequeath to my wife, NETTIE M. PIPE, absolutely and forever, all real property, together with improvements thereon,

which I may own or to which I may be entitled at the time of my death, and all my personal effects, clothing, books, pictures, furniture, furnishings, household equipment and automobiles.

THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my "residuary estate", I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property.

FOURTH: On the death of my said wife if she survives me, first out of the property which can be identified as a part of my residuary estate, I

> give and bequeath * * * [to certain named remaindermen].

The value at the optional valuation date of the property passing under Article Third of the will was $217,429.84, all of which was included in the decedent's gross estate. (R. 26.)

In an opinion reviewed by the Tax Court, it was unanimously held that the interest received by the decedent's widow under Article Third of the will was a terminable interest and did not qualify for the marital deduction. (R. 32-40.)

The Court of Appeals, one judge dissenting, affirmed. (Pet. 12-22.)

ARGUMENT

There is no basis for further review of this case. The decision below, affirming that of the Tax Court, turns upon the provisions of a particular will and the applicable local law. The decision is correct, and it is not in conflict with that of any other Court of Appeals.

1. Section 812(e) of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 11-13), allows a deduction from the gross estate, in computing the federal estate tax, for certain gifts passing from a decedent to his surviving spouse. This so-called marital deduction, however, is not available for gifts of life estates and other "Terminable Interest[s]," defined in Section 812 (e)(1)(B) (Appendix, *infra*, pp. 11-12) as interests passing to the surviving spouse but which upon the lapse of time or the occurrence of a contingency will terminate and pass to any other person. There is no doubt that the interest of the surviving spouse in the

instant case (a life estate, coupled with a power to consume principal) will terminate upon her death and that the property will pass according to the decedent's will to the remaindermen named by him. Thus, the interest of the surviving spouse is a terminable interest for which no deduction is allowable unless it can qualify for deduction under Section 812(e)(1)(F) of the 1939 Code (Appendix, *infra*, pp. 12-13), which provides an exception to the terminable-interest rule.

Section 812(e)(1)(F) allows a deduction for interests passing from a decedent to his surviving spouse—

> in trust, if under the terms of the trust his surviving spouse is entitled for life to all the income from the corpus of the trust * * * with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or the estate of such surviving spouse, or in favor of either * * *) * * *.

The subparagraph is applicable, however—

> only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

Under the applicable Treasury Regulations (Treasury Regulation 105, Section 81.47a (Appendix, *infra*, pp. 13-15), the power possessed by the surviving spouse must be one "to appoint the corpus to herself as unqualified owner or to appoint the corpus as a part of her estate, that is, in effect, to dispose of it to whomsoever she pleases." The Court of Appeals, we submit, was correct in holding that the power given by the decedent to his wife, in the instant case, was not sufficiently broad to qualify for deduction under Section 812 (e)(1)(F) and the Regulations.

The wife's power to withdraw the principal of the trust for personal consumption is not, we submit, a power to appoint to herself free of the trust as unqualified owner. Indeed, under New York law there are severe restrictions on the wife's right to exercise such a power. Her power to consume corpus must be exercised by her only in good faith and honestly. She may not use it to defeat the intention of the testator that any property not personally needed by her during her life, shall, on her death, pass to remaindermen selected by him. Cf. *Matter of Lane*, 201 Misc. 1003, 1005. For example, under New York law, she may not exercise the power in order to found a charity, to give the principal to others, to give away her own property and live solely upon the principal of her husband's estate, or to so manage the property that it will pass to persons of her selection rather than those named by the decedent. *Matter of Briggs*, 180 App. Div. 752, 759, modified, 223 N.Y. 677. And even if the property is sold by her, the proceeds can be traced and the interests of the remaindermen will be protected. Cf. *Manktelow* v. *Nevlezer*, 200 Misc. 536. The primary purpose of the New York courts in such cases is to carry out the decedent's stated intention by protecting the remaindermen selected by him.[1]

The requirement in the Regulations that the surviving spouse have a power to appoint to herself free of the trust and as unqualified owner is, we think, in

[1] The taxpayer states (Pet. 6) that Mrs. Pipe is able to exercise the power by giving the property away, or by creating a trust reserving income for herself and providing for remainders on her death. No authority is cited for this assertion. We submit, on the basis of the cases cited above, that the New York courts would not allow the interests of the remaindermen to be defeated in such a manner.

accord with the congressional purpose in enacting Section 812(e)(1)(F). For only by possessing such a power, together with the right to all of the income for life, does the surviving spouse enjoy an interest which approaches that of a "virtual owner" of the property. S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 16 (1948-1 Cum. Bull. 331, 342). In a community property state each spouse is an absolute owner of one-half of the property owned by the marital community; on the death of one spouse the survivor is entitled to outright ownership of one-half of the community property and, accordingly, can dispose of it in any manner whatever. See *e.g.*, *Fernandez* v. *Wiener*, 326 U.S. 340, 348-350; *United States* v. *Rompel*, 326 U.S. 367, 369-370. The congressional purpose in equating estates of decedents in community property states with estates of other decedents through the marital deduction allowance is accomplished only if the surviving spouse acquires either an absolute fee simple interest (Section 812(e)(1)(A)), or an interest in trust which is tantamount to a fee simple interest (Section 812(e)(1)(F)). For this reason, the requirement in Section 812(e)(1)(F), that a wife who is life beneficiary of a trust have a power exercisable "in all events" to appoint the entire corpus to herself "free of the trust," must be interpreted so as to condition deductibility on the existence of an uncontrolled and unlimited right to appoint to herself as "unqualified owner * * * that is, in effect, to dispose of it to whomsoever she pleases." Treasury Regulation 105, Section 81.47a.[2] Recognizing that

[2] That the value of the unconsumed property might be includible in the wife's gross estate upon her death is no reason for construing the statute in such a manner as to allow a lesser power to qualify

the wife's power in the instant case is not tantamount to a fee simple interest (*Terry* v. *Wiggins*, 47 N.Y. 512; *Hasbrouck* v. *Knoblauch*, 130 App. Div. 378), and that the power to consume is not sufficiently broad to enable the wife to make a gift of the property either during her life or on her death, the Court of Appeals correctly affirmed the Tax Court's holding that the bequest of the decedent's residuary estate does not qualify for deduction under Section 812 (e)(1)(F) of the 1939 Code.

2. There is no conflict between the decision of the court below and that of any other Court of Appeals. It is true that the court below expressly disapproved what appears to be a contrary construction by the Tax Court of the requirements of Section 812(e)(1)(F) in *Estate of Ellis* v. *Commissioner*, 26 T.C. 694. A petition for review of that decision has been filed on behalf of the Commissioner and the case is now pending in the Court of Appeals for the Third Circuit. If the *Ellis* decision is reversed by the Third Circuit, no conflict will develop.[3] On the other hand, because of differences in the language of each of the wills in-

for the deduction. See *Starrett* v. *Commissioner*, 223 F. 2d 163, 166 (C.A. 1st); *Hoffenberg* v. *Commissioner*, 223 F. 2d 470 (C.A. 2d), affirming *per curiam* 22 T.C. 1185; *Shedd's Estate* v. *Commissioner*, 237 F. 2d 345 (C.A. 9th), certiorari denied, 352 U.S. 1024; *In re Sweet's Estate*, 234 F. 2d 401 (C.A. 10th), certiorari denied, 352 U.S. 878. Indeed, Congress specifically contemplated that such a situation might arise under the statute and enacted a provision designed to allow a credit in computing the estate tax of the spouse second to die in certain circumstances. See Section 814 of the 1939 Code, as added by Act of February 20, 1956, c. 66, 70 Stat. 26, Section 1; H. Rep. No. 1495, 84th Cong., 1st Sess. (1956-1 Cum. Bull. 948).

[3] The Commissioner's brief in the *Ellis* case has been filed in the Court of Appeals. The case will not be reached for argument before the next term of that court.

volved and because of possible differences in the applicable state law, an affirmance of the *Ellis* decision may not necessarily result in a conflict of decisions that would warrant consideration of the issue by this Court.[4]

3. This case does not have the importance which taxpayer seeks to attach to it. (Pet. 7-8.) Since the decision turns upon a proper interpretation of the terms of a particular will under the applicable state law (New York), it will not necessarily be controlling in other cases presenting a similar question.

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[4] Moreover, the decision in the case at bar is supportable on alternative grounds. Section 812(e)(1)(F) requires that a gift be made "in trust" for the surviving spouse. The decedent's residuary bequest was one of a *legal* life estate with remainders over, and it was the Commissioner's primary contention in the courts below that no trust in the statutory sense was created. Cf. *In re Walter's Will*, 141 N.Y.S. 2d 49; *Jacoby* v. *Jacoby*, 188 N.Y. 124, 129. The Tax Court agreed (R. 31-40), but the Court of Appeals did not pass upon this issue. Section 2056(b)(5) of the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. II, Sec. 2056) has changed the law in this respect and no longer requires that a gift be made *in trust*. See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A318 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4461).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [As added by Sec. 361(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or

enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * *

(F) *Trust with Power of Appointment in Surviving Spouse.*—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust his surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—

(i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for the purposes of subparagraph (B)(i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * *

(26 U.S.C. 1952 ed., Sec. 812.)

Treasury Regulation 105, promulgated under the Internal Revenue Code of 1939:

Sec. 81.47a [as added by T.D. 5699, 1949-1 Cum. Bull. 181]. *Bequests, Etc., to Surviving Spouse.*—

* * * *

(c) *Trust with power of appointment in surviving spouse.*—In the case of property interests which passed from the decedent to a trust, the terms of which satisfy the five conditions stated in this paragraph, the expression "passed from the decedent to his surviving spouse" embraces not only the beneficial interest therein of such spouse but also the interest therein subject to her power to appoint. (As to the treatment of trusts not meeting such conditions, see paragraph (b)(2) of this section.) The five conditions which must be satisfied by the terms of the trust are as follows:

(1) The surviving spouse must be entitled for life to all the income from the corpus of the trust.

(2) Such income must be payable annually or at more frequent intervals.

(3) The surviving spouse must have the power, exercisable in favor of herself or of her estate, to appoint the entire corpus free of the trust.

(4) Such power in the surviving spouse must be exercisable by such spouse alone and (whether exercisable by will or during life) must be exercisable in all events.

(5) The corpus of the trust must not be subject to a power in any other person to appoint any part thereof to any person other than the surviving spouse.

In determining whether the above-stated conditions (1) to (5), inclusive, are satisfied by the terms of the trust, regard is to be had to the applicable provisions of the law of the jurisdiction governing the administration of the trust. * * *

* * * *

In order to satisfy conditions (3) and (4), the power of the surviving spouse to appoint the entire corpus free of the trust must fall within one of the following categories:

(i) A power so to appoint fully exercisable in her own favor at any time following the decedent's death (as, for example, an unlimited power to invade).

(ii) A power so to appoint exercisable in favor of her estate. Such power, if exercisable

during life, must be fully exercisable at any time during life, or, if exercisable by will, must be fully exercisable irrespective of the time of her death.

(iii) A combination of the powers described under (i) and (ii). For example, the surviving spouse may until she attains the age of 50 years have a power to appoint to herself and thereafter have a power to appoint to her estate. However, condition (4) is not satisfied unless irrespective of when the surviving spouse may die the trust corpus will at the time of her death be subject to one or the other such power.

The power in the surviving spouse must be a power to appoint the corpus to herself as unqualified owner or to appoint the corpus as a part of her estate, that is, in effect, to dispose of it to whomsoever she pleases. Thus, if the surviving spouse entered into a binding agreement with the decedent to exercise the power only in favor of their issue, condition (3) is not met. The trust will not be regarded as failing to satisfy condition (3) merely because takers in default of the surviving spouse's exercise of the power are designated by the decedent. The decedent may provide that, in default of exercise of the power, the trust shall continue for an additional period.

* * * *

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